87-1699

NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

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GARY ELLIOTT, INDIVIDUALLY AND
AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN
and
HILLCREST BAPTIST HOSPITAL,

Appellees.

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On Appeal from the Supreme Court
of the State of Texas

*

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I.

Whether Texas' sanctions' rule, Rule 215, Texas Rules of Civil Procedure, as written - permitting as it does the dismissal with prejudice of lawsuits for alleged discovery abuses, even where there has been no violation of a prior discovery order, no allegation or showing that any of the answers to the interrogatories were "unreasonably frivolous", no allegation or showing of bad faith or contumacious conduct on the part of the parties or their counsel, no allegation or showing of prejudice to the complaining party and no resort to lesser sanctions, and even though there has been a good faith effort to comply with the discovery requests - is contrary to the Fifth and Fourteenth Amendments, as well as possibly other Amendments, to the Constitution of the United States.

II.

Whether Rule 215, as applied in this case, violated the Fifth and Fourteenth Amendments to the Constitution of the United States and the due process and equal protection rights of the Appellants, when it is considered that the Texas state district court utilized such rule to apply the drastic and ultimate sanction of dismissal with prejudice even though it is undisputed that: (1) Appellants had not violated any prior discovery order of the court (indeed none had even been issued); (2) the apparent basis for sanctions involved the failure to answer three out of 57 interrogatories submitted by Appellees and Appellants swore (without contradiction) that they did not know the answer to two of the three interrogatories and the third was answered before the sanctions hearing was held; (3) there was no allegation or showing that the answers to any of those three interrogatories were

"unreasonably frivolous"; (4) no prejudice (such as lost evidence) was suffered by Appellees as a result of Appellants' delay in answering the interrogatories; (5) a reasonable explanation was given for the delay in answering the interrogatories and for not knowing the answers to two of them; (6) the delay in answering the interrogatories resulted in no delay in the proceedings because the case had never been set for trial and was not set for trial when the state district court dismissed; (7) the state district court arbitrarily refused to consider lesser, more appropriate sanctions (if any were justified at all), in lieu of stripping away the Appellants' right to their day in court forever; (8) there was no allegation or showing that the Appellants themselves (as distinguished from counsel) were at any fault with respect to the interrogatories in question; and (9) there was no allegation or showing of bad faith

or contumacious conduct on the part of Appellants or their counsel.

III.

The State of Texas having provided a right of appeal to an intermediate court of appeals, with review by the court of lost resort (the Supreme Court of Texas), whether the Texas appellate courts' refusal to consider the appeal in this case on its merits, because no transcript of the hearing on sanctions before the state district court was filed with the appellate courts, violated the Appellants' rights to due process and equal protection of the laws under the Fifth and Fourteenth Amendments and other provisions of the Constitution of the United States, because of the undisputed facts that: (1) a complete record of all matters filed in the state district court (including the interrogatories in question and answers thereto; the pleadings; motions for

sanctions; responses; and all orders and judgments of the court) was timely filed with the state appellate court; (2) the pleadings (motions for sanctions), on the basis of which sanctions were sought, did not, on their face, justify the drastic sanction of dismissal with prejudice; (3) the Appellees' briefs before the Texas appellate courts did not disagree with the Appellants statement of the essential facts[1]; and (4) the transcript of the hearing on sanctions was wholly unnecessary to a disposition of the merits of the appeal.

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1. Texas has a rule, 74(b) of the Texas Rules of Appellate Procedure (T.R.A.P.), see text under Statutory Provisions, which provides for acceptance as correct, by the state appellate courts, assertions of facts by appellants not challenged by the appellees.

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GARY ELLIOTT, Individually
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Appellees.

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On Appeal from the Supreme Court Supreme
of the State of Texas

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JURISDICTIONAL STATEMENT

Appellants Gary Elliott, Individually and as Next Friend of Shauna Marie Elliott, A Minor, seek review of a decision of the Supreme Court of Texas affirming a dismissal of appellants'

medical malpractice case with prejudice[2].

OPINIONS BELOW

The action of the Supreme Court of Texas, denying Appellants' Motion for Rehearing dated January 4, 1988, is set forth in Appendix A. The opinion of the Supreme Court of Texas, which is in the form of a denial of a writ of error, with the notation, "no reversible error (n.r.e.)", dated November 18, 1987, is set forth in Appendix B. The judgment of the state court of appeals, dated August 13, 1987, is set forth in Appendix C. The order overruling the Appellants' motion for new trial, entered by the state district court on August 25, 1986, is set forth in Appendix D. The judgment of the state district court dismissing with prejudice Appellants' case in the state district court, dated June 13, 1986, is

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2. The names of all parties in the proceedings below are included in the caption of the case.

set forth in Appendix E. All of the opinions of the state courts of Texas were unpublished.

JURISDICTION

This is an appeal from a final judgment dismissing Appellants' medical malpractice case with prejudice under and pursuant to the state courts of Texas' discovery sanctions' rule, Rule 215, Texas Rules of Civil Procedure. Appellants contend that Rule 215, as written, is unconstitutional because it permits dismissal with prejudice of cases without violation of any prior discovery order; without an allegation or finding of bad faith or contumacious conduct on the part of the parties or their counsel; without a showing of prejudice to the complaining party; without a resort to lesser sanctions; and because the rule clearly extends beyond the outer limits of the constitutionality of discovery sanctions' rules as set forth by this Court in

Insurance Co. of Ireland v. Compagnie des Bauxites de Guinie, 450 U.S. 694 (1982) and Societe Internationale v. Rogers, 357 U.S. 197 (1958). In addition, Appellants contend that Rule 215, even if constitutionally valid as written, was unconstitutionally applied in this case, and that the state court of appeals unconstitutionally refused to consider the merits of Appellants' appeal on an inapplicable hypertechnicality. The Texas Supreme Court decided this case on November 18, 1987 (by virtue of its order denying application for writ of error with the notation "no reversible error") and denied Appellants' timely filed motion for rehearing on January 6, 1988. See Appendices A and B. On March 31, 1988, a notice of appeal was filed in the Texas Supreme Court; in the Court of Appeals for the Tenth District of Texas at Waco; and in 19th Judicial District Court of McLennan County, Texas. See Appendices

F-1, F-2 and F-3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sect. 1257(2). See **Japan Air Line Ltd. v. County of Los Angeles,** 441 U.S. 434 (1979). Pursuant to Rule 24.4(c) of the Rules of this Court, the Attorney General of Texas was served with three copies of this jurisdictional statement.

STATUTORY PROVISIONS

The pertinent provisions of Rule 215 of the Texas Rules of Civil Procedure, provides that "a party ... may apply for sanctions or an order compelling discovery ... if a party fails ... to answer an interrogatory submitted .... [T]he discovering party may ... apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein ***without the necessity of first having obtained a court order compelling such discovery....*** For purposes of this subdivision an evasive *or* ***incomplete answer*** is to be treated as a

failure to answer .... 2b ... If a party fails to comply with proper discovery *requests* ... the court ... may ... make such orders in regard to the failure ... and among others the following: * * * (5) An order dismissing *with* or without *prejudice* the action or proceedings or any part thereof .... (Emphasis ours). For a more detailed statement of Rule 215, see Appendix Q. There are a number of provisions in the Texas Rules of Appellate Procedure (T.R.A.P.) which relate to the unconstitutional action of the Texas appellate courts in refusing to consider Appellants' appeal on the merits and they are included in Appendix R.

STATEMENT OF THE CASE

Succinctly stated, this case involves a malpractice suit brought by a surviving husband, who is in the state penitentiary, and his minor daughter for wrongful death damages arising out of the death of the wife and mother; the defendants are a Waco, Texas hospital and doctor, represented by two prominent Waco law firms; a Waco judge incredibly dismissed the case with prejudice because the plaintiffs simply did not know the answer to two of the interrogatories; and then a Waco Court of Appeals ever more incredibly refused to consider the Appellants' appeal on its merits. The rule of procedure, under which the district court dismissed, is unconstitutional on its face and/or was unconstitutionally applied and the state court of appeals' refusal to consider the appeal on its merits violated the Appellants' due process rights.

In more detail, the Transcript that was before the Texas state appellate courts

indisputably established the following procedural facts:

1. The Appellants alleged that Phyllis Elliott, then the wife of Gary Elliott and mother of Shauna Marie Elliott, a minor, was involved in an automobile accident on September 25, 1981, and was immediately thereafter carried to the Appellee Hillcrest for emergency treatment. She was placed in intensive care and thence transferred to a private room on September 28, 1981, where she died the next morning at approximately 5:00 a.m. It is Appellants' contention that Phyllis Elliott's death was proximately caused by medical malpractice on the part of Appellee Hillcrest and Appellee Lewin (Appellee Lewin was her treating doctor from the moment she entered the hospital for emergency care)(TR 10, 11).[3]

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3. Under Texas appellate court parlance, "Transcript" refers to all the pleadings, motions, responses, etc. in the case. See Rule 51, T.R.A.P. The "Statement of Facts" refers to a transcript of sworn testimony at a trial or hearing. See Rule 53, T.R.A.P.

2. On May 21, 1985, the Appellee Lewin submitted his First Set of Interrogatories to the Appellants (TR 32-37; see App. G). At the same time, Appellee Lewin filed an Amended Answer leveling a special exception to the Appellants' general allegations of negligence (TR 38). On May 25, 1985, Appellee Hillcrest submitted its First Set of Interrogatories (TR 40-48; App. H). Significantly, the interrogatories of Appellee Hillcrest are almost precisely identical to the interrogatories of Appellee Lewin.[4]

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4. For example inter. 1 of Appellee Lewin and Appellee Hillcrest inquire about the name, address, etc.; inter. 4 of Lewin and 2 of Hillcrest inquire about children information; inter. 5 of Lewin and 5 of Hillcrest inquire about employment information of the Appellants; inter. 11 of Lewin and 23 of Hillcrest inquire about felony convictions; inter. 12-16 of Lewin and 12-16 of Hillcrest inquire about identity of experts, reports and so forth; inter. 17 of Lewin and 11 of Hillcrest inquire about knowledge of relevant facts; inter. 20 of Lewin and 9 of Hillcrest inquire about doctors who had treated Phyllis Elliott; inter. 22 of Lewin and 10 of Hillcrest inquire about hospitals in which Phyllis Elliott had been a patient; inter. 24 of Lewin and 22 of Hillcrest

3. Not having received answers to the interrogatories within the time prescribed by the rules, Appellee Hillcrest, on September 27, 1985, filed a Motion for Sanctions, seeking dismissal, or in the alternative a striking of pleadings, or in the alternative attorneys fees (TR 56-64; App. I). Appellants filed answers to Hillcrest's interrogatories on October 31, 1985. (TR 56-64; App. H). Subsequently, on November 4, 1985, Appellants received a letter from counsel for Appellee Hillcrest, dated November 1, 1985, indicating that Appellees were satisfied with all answers but the answers to interrogatories 9, 10 and 22. (App. J). Interrogatory 9 asked for the names and addresses of all doctors who had examined

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inquire about allegations of specific negligence; inter. 25-27 of Lewin and 6, 20 and 21 of Hillcrest inquire about information pertaining to the parents and children of decedent and the name of the guardian of the minor plaintiff.

or treated the deceased during the ten years prior to her death and interrogatory 10 asked for the name of every hospital to which the deceased had been admitted for treatment as a patient. Appellant Gary Elliott answered interrogatory 9 by stating that he would attempt to find out the names of doctors who may have treated his deceased wife in the past (TR 59; App. H); and answered interrogatory 10 by stating that "Phyllis (the deceased wife) was admitted to the hospital for child birth and **this is the only time I know.**" (TR 60; App. H; emphasis ours). Gary Elliott answered interrogatory 22 with a general assertion of negligence (TR 63; App. H). The hearing on the Motion for Sanctions was set on a couple of occasions but did not take place in 1985 or early 1986 (See entire TR).

4. The next action reflected in the Transcript occurred when, on May 23, 1986, Appellee Lewin filed a Motion for

Sanctions similar to the Motion for Sanctions which had previously been filed by Appellee Hillcrest, requesting dismissal, or in the alternative striking of the pleadings, or an order compelling answers to interrogatories, or, alternatively, attorney fees (TR 65-67; App. K). On June 4, 1986, though the Appellants had reasonably deemed answers to Appellee Hillcrest's interrogatories to be tantamount to a response to interrogatories of both Appellees since they were virtually identical, Appellants nevertheless filed answers to Appellee Lewin's interrogatories. (See answers to interrogatories, TR 71-77; App. G). It is significant to note that the Appellee Lewin at no time prior to the eventual dismissal of this case made any complaint or contention that any specific interrogatory answer furnished by the Appellants was inadequate (see entire TR).

5. Some of the answers given by the Appellants to the interrogatories of Appellee Lewin are significant. For example, Gary Elliott stated that he had been incarcerated in the Texas Department of Corrections from 1981 to the (then) present time (answer to inter. 2; TR 71; App. G); he also stated, in response to inter. 20, that Dr. Lewin "is the only physician that I have knowledge of that (ever) examined Phyllis" (TR 74; App. G); and in answer to inter. 21, he responded that the only hospital that Phyllis Elliott had ever been in, other than Hillcrest, was the hospital in which she gave childbirth and that "I do not know the name of that hospital" (see answers to inter. 21 and 22, TR 75; App. G). These statements were never contradicted by the Appellees at any time throughout the proceedings and, therefore, it is undisputed that Gary Elliott did not have, within his knowledge, the names or addresses of

any doctors or hospitals that may have treated Phyllis Elliott prior to the car wreck in question and the treatment by Appellees.

6. The hearing on the Motion for Sanctions of both Appellees was set for June 13, 1986. At that time, the case had not been set for trial and no pre-trial order had been entered prescribing deadlines for discovery. At that time, no prior discovery order had been requested or entered. At that time, no hearing had been requested or conducted or an order entered to determine whether Appellants should be compelled to further answer interrogatories 9, 10 or 22, even though Appellants had in good faith answered that they did not know the answers to Nos. 9 and 10 and that an answer to No. 22 was premature.

7. At the time of the sanctions hearing, the only motions for sanctions on file which could provide a basis for any

sanctions were the one and only motion each of the Appellees' filed. (See App. I and K). Both were almost identical and were stated in very general terms. They were both filed *before* the respective sets of interrogatories were answered by Appellants. They were both *not* amended after the answers to interrogatories were filed, in order to reflect the situation as it was at the time of the hearing (e.g., the motions alleged no answers had been filed when in fact answers had been filed to all 57 interrogatories). And both focused on the erroneous assumption that no answers had been filed without specifying any other ground for imposing sanctions. The motions contained ***no allegations*** that: the answers filed were inadequate; *or* that any answers were "unreasonably frivolous"; *or* that there was any intentional delay in answering the interrogatories; *or* that Appellees had been prejudiced in any way by the delay in receiving the answers;*or*

that Appellants or their attorneys were guilty of bad faith or contumacious conduct or even of negligence in connection with the interrogatories. In short, the motions for sanctions contained no allegations justifying *any* sanctions except perhaps attorneys fees and they certainly did not justify the ultimate sanction of dismissal with prejudice (id., App. I and K).

8. Counsel for Appellants requested that the sanctions hearing be postponed to another date because the only counsel for the Appellants (the undersigned counsel) was in trial in another court (TR 91). Counsel for Appellees refused such postponement and, therefore, counsel for the Appellants had to send a young attorney from Houston (Ms. Ashley), to the hearing in his place. As she stated in her affidavit attached to Appellants' Motion for New Trial (TR 91; App. N), when she arrived at the hearing she was presented with an affidavit by the

attorney for Appellee Hillcrest concerning the alleged procedural history of the case, which was ordered filed, but that no evidence was offered at the hearing. (id. TR 91; App. N).

9. Appellants filed, prior to the hearing on the motions for sanctions, a written response to said motions (TR 78, 79; App. L). In that response Appellants pointed out to the district court the difficulties that Appellants had experienced in completing the answers to interrogatories because of the fact that Mr. Elliott was in a penal institution and counsel for Appellants had been unable to establish any "direct contact with relatives and/or in-laws" (TR 78; App. L) and how these circumstances had made it difficult to obtain the answers to the interrogatories about Phyllis Elliott's past medical history. The Response went on to point out that the Appellants did not have medical records of any other treatment or confinement other than the

treatment and confinement involving the automobile accident (TR 78; App. L). The Response further indicated that Appellants would provide the Appellees with a release or a medical authorization so that they could obtain any documents they wanted through their own efforts (TR 78; App. L). In addition, attached to the Response were notices of depositions of Dr. Lewin and the nurses of Hillcrest Hospital who were in attendance to the decedent prior to her death (TR 80, 81; App. L). And the Response stated that following those depositions the Appellants would provide the names of the Appellants' expert witnesses within sixty days and thence make such witnesses "available to you for depositions" (TR 79; App. L). Appellants also stated that they would be ready to go to trial after such discovery was completed "at the convenience of the Court" (even though the trial court had never set the case for trial, established any discovery deadlines, or indicated when it would set the case for trial), the Appellants requesting only "sufficient notice so as

to facilitate the issuance of a bench warrant for client" so that he could be temporarily released from the penitentiary for appearance at the trial. (App. L).

10. Appellants also filed, prior to the hearing on the motions for sanctions, a Supplemental Answer to Interrogatory 22, listing specific acts of negligence to the best of Appellants' ability to do so, in the light of the information then available. (TR 78, 79; App. M). Moreover, the Appellees did not ever, though a special exception had been filed with respect to Appellants' general allegations of negligence (TR 38), attempt to have a hearing on such exception (see entire Transcript).[5]

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5. A "special exception" is the procedure under Texas rules of procedure for seeking to have the opposing party plead more specifically. See Rules 90, 91, 166, T.R.C.P. After it is filed, the burden is on the party who filed same to request a hearing on the special exception and obtain a ruling of the trial court. Such procedure, rather than through interrogatories, is the appropriate vehicle for requiring a party to plead more specifically. In fact, if Appellees had failed to have the pleadings clarified before trial they would have waived any right to complain about them. See Rule 90, T.R.C.P.

11. In addition, up to and at the time of the June 13, 1986 hearing, the Appellees had *not*, at any time prior thereto, requested or secured any discovery order of any kind; they had *not* requested or obtained an order determining whether answers 9, 10 or 22 were "legally deficient" under the circumstances; or whether any of such answers had been "unreasonably frivolous"; or whether the delay in filing the answers was intentional; and they had *not* requested or secured an order compelling answers to such interrogatories (See entire Transcript).

12. Despite the foregoing state of the record, the district court, by order signed June 16, 1986, entered a final judgment **dismissing Appellants' case with** prejudice (TR 84, 85; App. E). The judgment simply recited that the Appellants had due and proper notice of the hearing on sanctions, had resisted

"proper discovery directed to Plaintiffs" and that "the Court further finds that it should impose the sanctions authorized by Rule 215 and strike all pleadings of Plaintiffs herein, dismiss all Plaintiffs claims and causes of action herein with prejudice and render judgment that Plaintiffs take nothing from Defendants herein". (TR 84, 85; App. E). The judgment did *not* reflect any finding of bad faith or contumacious conduct; that any of the answers were "unreasonably frivolous"; that the delay in answering the interrogatories was intentional; that the delay in answering the interrogatories in any way prejudiced the Appellees; that no reasonable explanation on the part of Appellants had been made; or any ground other than, simply, that Appellants had "resisted" discovery. App. E.

13. The Appellants filed a Motion for New Trial (TR 91; App. N) which further amplified upon the above; further discuss-

ed the difficulties Appellants had in securing answers to the interrogatories; and attached thereto was the affidavit of Ms. Ashley explaining what took place at the hearing on the motions for sanctions (TR 91; App. N).

14. The district court summarily overruled the Motion for New Trial. (App. D).

The foregoing is a summary of the Transcript which was officially certified by the clerk of the state district court in this case and timely filed in the state court of appeals. This Transcript was before the court of appeals and later the Texas Supreme Court. There was no Statement of Facts before the state court of appeals or Supreme Court because there was no need for one, particularly since there was no evidentiary hearing on sanctions, except that the Appellee Hillcrest filed an affidavit.[6]

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6. The Appellees contended below that

Despite the fact that the affidavit was not a part of the Transcript,[7] the

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there were two evidentiary hearings, the hearing on the motions for sanctions and the hearing on Appellants' motion for new trial. But, at the hearing on the motions for sanctions, the only thing offered was Hillcrest's counsel's affidavit, and as stated above, Hillcrest admitted in its Brief that that affidavit did not contradict the material procedural facts stated by Appellants in their Brief. See App. O. The burden was upon Hillcrest to request that, any matters it deemed omitted from the Transcript that it wanted to rely upon, be included in the Transcript. See Rule 51, T.R.A.P.

At the hearing on motion for new trial, the only evidence offered was the testimony of undersigned counsel. Again, the testimony was offered on behalf of Appellants and was consistent with the Statement of the Facts in Appellants' Briefs before the state court of appeals and the Supreme Court of Texas.

If there was any "evidence" which could have been gleaned from the hearing on motion for new trial which contradicted the material facts as stated by Appellants in their Brief in the state appellate courts, or which would have been in any way helpful to Appellees, Appellees had the duty, under Rule 74(f), T.R.A.P., to point such evidence out to the appellate courts in their Briefs. They failed to do this and the explanation for such failure is obvious: the essential material facts as stated by the Appellants before the state appellate courts were absolutely correct.

7. Section 15.001 subch.A of the Texas Civil Practice and Remedies Code allows plaintiffs to sue the doctor and hospital in the county where the malpractice occurred.

state court of appeals knew that it did *not* contain anything new or material in addition to the allegations in Appellees' motions, did not contain any allegations of bad faith or contumacious conduct on the part of the Appellants or their attorneys and did not contain anything contrary to the assertion of the facts by Appellees in their Briefs before the state court of appeals. This is true because the Appellee Hillcrest stated in its Brief before the state court of appeals:

> "At the hearing (on sanctions), the attorney for Hillcrest, Roy L. Barrett, produced an affidavit signed by him outlining the procedural history of this case, ***as set out above.***" (App. D, attached to this Appeal and Appendix C before the Supreme Court of Texas; emphasis ours).

Most important, the facts stated by Appellants in their Brief before the state court of appeals and the state Supreme Court were not disputed in any ***material*** respect by Appellees. Compare statement of facts in this appeal by Appellants (which is the same as the statement of facts by

the Appellants in the Briefs before the state appellate courts) to the statement of facts by Appellees in Appellees' Briefs before the state court of appeals. See App. O and P.

The state court of appeals, as we noted above, rationalized around reviewing the merits of the district court's dismissal with prejudice by holding that, in the absence of an official "Statement of Facts", it had to presume that the state district court's actions were correct. App. C. A writ of error was timely sought in the Supreme Court and that Court summarily refused writ of error, "no reversible error", App. B, and, thereafter, refused rehearing, App. C.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Gary Elliott, one of the dispossesed of our society who is confined to a state penal institution, and his minor daughter, Shauna Marie Elliott, two plaintiffs who do not reside in Waco, Texas, have become

the victims of Texas' "home town rule". These humble people had the audacity to sue a prominent Waco doctor and a prominent Waco hospital in Waco. These Waco defendants were defended by two prominent Waco law firms. The Waco state district judge, elected in Waco, without even a semblance of fairness, extended Rule 215, Texas' sanctions' rule, beyond constitutional limits by utilizing it to strip the Appellants of all rights to have their case determined on the merits, even though Appellants had made a good faith effort, to the extent of their knowledge and ability to do so, to respond to the interrogatories in question; had not violated any prior discovery or other order of the court; Appellees had not alleged or shown any bad faith or contumacious conduct on the part of Appellants or their counsel; had not alleged or shown that any of the answers to the interrogatories were "unreasonably

frivolous"; and no prejudice had been alleged or shown by Appellees as having arisen out of the delay in receiving the interrogatory answers. Then the Waco court of appeals, also elected in Waco, also made no pretense of according due process to the Appellants. It shockingly held that it would not consider Appellants' appeal on the merits because no Statement of Facts had been filed, even though no testimony had ever been taken, a Statement of Facts was not necessary for a resolution of the appeal on its merits, the Briefs before the Waco court of appeals established that there was no dispute among the parties as to the material facts, and the pleadings in question (motions for sanctions) demonstrated, on their face, the unconstitutionality of the state district court's dismissal with prejudice. Texas' elected judges are coming under increasing criticism because of the possible impact

that large contributions by lawyers who practice before them might have upon judicial fairness and equality in the Texas state courts."

In any event, this case is an extremely important one, clearly justifying this Court's full attention. It is no secret that all courts, federal and state, are striving for greater efficiency, reduction of caseloads, elimination of frivolous cases and an overall marshalling of judicial assets toward meritorious cases. Part of the outfall of this movement is the accelerating toughening of sanctions rules, particularly in the state courts, including Texas. See Kilgarlin and Jackson, *Sanctions For Discovery Abuse Under New Rule 215*, 15 St. Marys Law Journal 767 (1984). While Appellants, as we should, applaud the efforts to acheive greater judicial and docket efficiency, it

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8. In January, 1988, CBS' Sixty Minutes carried an expose' on the problem.

has now become apparent to us that many courts, particularly the Supreme Court of Texas, have, in their unbounded zeal, adopted sanctions rules that unconstitutionally give the state trial courts the power to abrogate basic due process rights of individual parties.

As we discuss, *infra*, Rule 215 allows dismissals with prejudice even though there has been an effort to comply with discovery requests, no prior order of discovery has been violated, no prejudice has been sustained by the moving party and no bad faith or contumacious conduct has been alleged or shown. Rule 215, as worded, and the application of it by the state courts of Texas in this case, clearly violates the constitutional parameters with respect to discovery sanctions set forth by this court in *Insurance Co. of Ireland v. Compagnie des Bauxites de Guince*, 450 U.S. 694, 707, 708 (1982); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 346-354 (1909); and *Societe*

Internationale v. Rogers, 357 U.S. 197, 208-212 (1958).

Since the apparent basis for the sanctions in this case involved the failure to answer two interrogatories, the answers to which Appellants simply did not know, Rule 215, and the Texas state courts' implementation of it, conflicts with this Court's holding in *Societe Internationale* to the effect that a party cannot have the ultimate sanction of *dismissal with prejudice* imposed upon it for its failure to provide discovery *on matters not within such party's knowledge or power to provide*. 357 U.S. at 208-212.

While *Compagnie des Bauxites*, *Hammond Packing* and *Societe Internationale* provide some direction to all courts concerning the due process and equal protection limitations upon the imposition of discovery sanctions, we respectfully submit that the recent rapid outward expansion of the scope of procedural rules providing for such sanctions creates a

national crisis in the form of a growing and ominous threat to the constitutional rights of those who resort to our state courts.

Moreover, the state appellate court's refusal to consider the Appellants' appeal on its merits runs counter to the rationale of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-433 (1982), to the effect that the state courts, once they adopt a judicial entitlement such as an appellate process, must implement such appellate process in a manner consistent with due process and equal protection, and other constitutional limitations.

A. Rule 215 and the Texas state courts' implementation of it violate the due process provisions of the U.S. Constitution.

Rule 215 of the Texas Rules of Civil Procedure expressly authorizes the Texas state courts to dismiss cases with prejudice even though a party has made an effort to provide the requested discovery

and has not violated any prior discovery orders. The Supreme court of Texas, in *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 320 (Tex. 1985), made clear its intention to give the trial courts virtually unbridled discretion to dismiss cases on discovery sanctions grounds. Compare the Supreme Court's opinion to that of the opinion of the state court of appeals, 689 S.W.2d 472 (Tex.App.-Houston [14th Dist] 1984).

It must be recognized at the outset that the Texas Legislature has delegated to the Supreme Court of Texas the power to write Texas Rules of Procedure and it is the Supreme Court of Texas that wrote and adopted Rule 215 in its present form. Justice Kilgarlin of the Texas Supreme Court gives us some insight into the thinking of the Supreme Court of Texas.[9]

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9. In *Downer*, the Texas Supreme Court cited Justice Kilgarlin's article with approval. 701 S.W.2d at 242.

In his article on sanctions, 15 St. Mary's Law Journal 767, he begins by pointing out that Rule 215 is only "partially patterned after its counterpart in the Federal Rules of Civil Procedure, Rule 37"; that Rule 215 "is more than an incorporation of Federal Rule 37" and "extends beyond prior Texas practice and beyond current federal practice." id., at 769. Justice Kilgarlin articulates one of the primary areas of expansion of discretion intended by the adoption of Rule 215:

> The most interesting aspect of subdivision (1) is the option given the movant to ask the court to impose sanctions on his non-complying opponent *without first obtaining a court order directing the opponent to make discovery.* Thus, the trial court is free to order sanctions in a vast category of cases in which it formerly had no such prerogative.
>
> *Before the effective date of the new rules, if the party from whom discovery was requested made some response the discovering party was necessarily obligated to move for an order to compel discovery. Only after violation of that order could the discovering party seek and the court impose sanctions.* . . .
>
> * * * * *
>
> The new Rule 215 is designed to incorporate *and extend* the holding of Lewis v. Illinois Employers Insurance

Co. [590 S.W.2d 119, 119-20 (Tex. 1979)]. In *Lewis*, the Texas Supreme Court ruled that the trial court's authorization to impose sanctions depended on the degree of compliance or non-compliance present. ***When a party responded to some, but not all, interrogatories, the interrogating party was required to move for an order compelling the interrogated party to answer. If that order was violated, the court had discretion to utilize sanctions.*** But when the interrogated party made no response, the propounding party could move immediately for sanctions. In this manner, *Lewis* distinguished between a total failure to answer an **entire set of interrogatories** and an inadequate or imcomplete response to a set of interrogatories.

The *Lewis* distinction is not perpetuated by Rule 215. Rather, the rule applicable to an absolute failure to answer interrogatories under *Lewis* **now obtains for any failure to adequately respond.** This treatment is prescribed for all forms of discovery that are initiated by action of the parties independent of the court, except for requests for admissions. **In other words, if the deposed, interrogated, or requested party does not respond sufficiently to one question or request for production, the discovering party may elect to move immediately for sanctions without first obtaining an order for discovery.** The Texas Supreme Court explains:

New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, ..."

15 St. Mary's Law Journal at 776-779; emphasis ours.

If the unconstitutional intent of the Supreme Court of Texas is not clear enough from the foregoing, the unconstitutionality of Rule 215 is sealed by these two footnotes of Justice Kilgarlin, presumably speaking for the Texas Supreme Court:

> 69. The potential impact of this new authorization of sanctions is underscored by a comparison with federal procedure. **In federal courts the general rule is that sanctions cannot be imposed until the errant party has violated a court order.** Federal Rule 37(a) provides a mechanism by which the discovering party may move the court to compel previously requested discovery. ... Violation of any discovery order activates the power of the trial court, upon motion, to decree sanctions under Rule 37(b)(2). *See* Fed.R.Civ.P. 37(b)(2); 8 C. Wright & A. Miller, Federal Practice and Procedure Sec. 2282, at 757 (1970). ... For sanctions to be available in the absence of a violated court order, the failure to cooperate with discovery must be absolute. *See* Laclede Gas Co. v. Warnecke Corp., 604 F.2d 561, 565 (8 Cir. 1979); SEC v. Research Automation Corp., 521 F.2d 585, 588-89 (2 Cir. 1975). **The situations in which the federal judges have discretion to impose**

> **discovery sanctions, therefore, are much more limited than those now open to the Texas trial judge.**
>
> 70. TEX R CIV P 215 comment. It is interesting that the Committee on Administration of Justice and the Advisory Committee suggested that sanctions be made available under Rule 215(2)(b) *only* after breach of an order commanding discovery. Instead, the Texas Supreme Court designed the scheme herein. **This is a clear indication of the court's intention to bestow broad discretionary powers upon the trial court.**

15 St. Mary's Law Journal at pp. 778, 779; emphasis ours.

Justice Kilgarlin repeatedly reaffirms the excessive hard line that will be taken by the Texas courts and essentially manifests the intention by the Supreme Court of Texas to virtually abdicate its duty of appellate review by giving the trial courts unlimited sanctions power. For example he says:

> Paragraph (2)(b) is the mainstay of Rule 215. **It is a sweeping grant of power to utilize sanctions against the parties to force discovery.** A study of this paragraph's provisions further reveals the tremendous scope of the power bestowed upon the trial court to

deal with efforts to frustrate discovery.

15 St. Mary's Law J1 at 794. Another example:

> The only alteration of the extreme sanctions provision effected by the 1984 amendments resolves a split amoung the Texas courts of appeals. Under the prior rule, it was not clear whether dismissal with prejudice was an appropriate sanction. **The new rule clarifies that uncertainty by expressly providing for dismissal with or without prejudice.** This provision represents another incident of the broadening of the trial court's power to handle discovery problems.

15 St. Mary's Law J1 at 801. And, further:

> The new rule may well have undercut a tendency of the courts to hold that the trial judge necessarily abuses his discretion when he orders dismissal or default any time the sanctioned party has made some effort to comply with the discovery requests.

15 St. Mary's Law J1 at 803.

It is clear to us that the radical action of the state district court in this case is the inevitable product of the unconstitutional powers included in the new Rule 215 and Justice Kilgarlin's and

the Supreme Court's unconstitutional interpretation of it. Justice Kilgarlin and the Texas Supreme Court have misinterpreted or chosen to ignore the constitutional limitations upon discovery sanctions imposed by this Court.[10] In *Societe International*, this Court stated:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 42 L ed 215, 17 S Ct 841, and *Hammond Packing Co. v. Arkansas*, 212 US 322, 53 L ed 530, 29 S Ct 370, 15 Ann Cas 645. **These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.** The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 USC (1952 ed.), p. 4325.
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> * * * * *

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10. Justice Kilgarlin did give lip service to the possibility of some Constitutional limitations upon Rule 215, 15 St. Mary's Law J1 at 795, 796, but he, and thus the Supreme Court, clearly failed to recognize or heed the mandate in *Compagnie* that Rule 37, as construed by the Federal courts, sets the outer Constitutional limits upon discovery sanctions' rules and their implementation. See discussion, infra.

> These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. . . . Certainly substantial constitutional questions are provoked by such action.
>
> * * * * *
>
> In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

357 U.S. at pp. 209-212; emphasis ours.

In ***Compagnie des Bauxites***, this Court articulated one of the Constitutional limitations upon discovery sanctions as being that the sanction must be "just". 456 U.S. at 707. In holding the sanction of dismissal was "just" in that particular case, the Court noted specifically that the petitioners violated "repeated orders" to provide the material requested; that petitioners had been previously "warned

... of a possible sanction"; and the proposed sanction was to be nullified if the sanctioned party were to otherwise produce information which would satisfy its burden on the issue in question. 456 U.S. at 707, 708.

Most important, this Court states in *Compagnie* that Rule 37 "embodies the standards established in *Hammond Packing Co. v. Arkansas . . .* for the due process limits on such rules". id. at 705. Under review in *Hammond Packing* was a procedural statute of the state of Arkansas. It was contended that such statute violated the Fourteenth Amendment to the U.S. Constitution because it authorized the striking of pleadings and granting of a default judgment if a foreign corporation defendant disobeyed an order to produce witnesses before a state commission. The Court held that the statute was not unconstitutional but reached that conclusion *only* because the statute was

interpreted as requiring that a prior order of discovery be violated ***before*** the sanctions could be applied and because it was also interpreted as *not* authorizing a sanction of dismissal if the party complained of had made an effort to comply with an order of discovery. 53 L.Ed.2d at 543-546.[11]

We interpret ***Hammond Packing*** as imposing the following firm Constitutional limitations upon sanction statutes or rules of the states: they must not allow the use of the ultimate sanctions (dismissal or default judgment) unless a

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11. The Court stated: "... The fundamental guaranty of due process is absolute, and not merely relative. The inherent want of power in a court to do what was done in Hovey v. Elliott was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. **Indeed, in Hovey v. Elliott, the impotency of the legislative department to endow the judiciary with the capacity to disregard the Constitution was emphasized.**" 212 U.S. at 544.

prior express discovery order of the court has been violated and the party against whom the sanctions are sought has not made a good faith effort or shown an inability to comply with such discovery order but, rather, has been guilty of bad faith or contumacious conduct in failing to comply. Since it was intended that the *Hammond* Constitutional limitations be "embodied" in Rule 37 and Rule 37, according to this Court in *Compagnie*, imposes "the due process limits upon said rules (discovery sanctions rules)", it is clear that Rule 215's plain wording - particularly as Justice Kilgarlin and the Texas Supreme Court have interpreted it - goes far beyond Rule 37 in allowing sanctions dismissals and thus is clearly unconstitutionally broad and must be struck down.[12]

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12. And in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Court upheld a Rule 37 sanction of dismissal but *only* because the district court had expressly found "flagrant bad faith" on the part of the parties sanctioned; such parties had repeatedly failed to comply with prior discovery orders; and the district court had expressly warned such parties that, if they did not comply, the case would be dismissed. 427 U.S. at 642, 643.

And even if the statute as written is not unconstitutional, most certainly the manner in which Rule 215 was applied in this case - imposing the ultimate sanction of dismissal with prejudice where the interrogated party simply did not know the answers to the two interrogatories in question; the interrogated party made a good faith effort to comply; no prior discovery order was issued or violated; no bad faith or contumacious conduct was alleged or shown; no prejudice to the complaining party was alleged or shown; and the trial court had lesser sanctions available to it but refused to consider them - violated the Appellants' due process and equal protection rights under the Constitution of the United States.

Since Rule 37 must be "strictly construed", *Salahuddin v. Harris,* 782 F.2d 1127 (2 Cir. 1986), and dismissal is permitted "only in the face of a clear record of delay or contumacious conduct by

the plaintiff(as distinguished from his counsel)", *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885 (5th Cir., 1958) cert den. 392 U.S. 928, those limitations apply with equal force, in the Constitutional sense, to similar rules adopted by state courts.

In sum, the importance of questions concerning the constitutional limitations upon discovery sanctions rules adopted by the state courts, such as Rule 215, cannot be overstated. Some state court systems, such as Texas, have blatantly ignored the constitutional limitations placed upon sanctions rules, as articulated in *Hovey v. Elliott*, *Hammond Packing*, *Compagnie des Bauxites* and *Societe Internationale* and have plunged forward and adopted or applied such rules in such a way that, unless corrected by this Court, an untold number of litigants are destined to have their rights to a trial on the merits unconstitutionally taken away. The situa-

tion is only getting worse - not better - and the need for this Court to address such problem has now become critical.

B. The Appellants' Constitutional rights to due process and equal protection were also violated by the Texas appellate courts' refusal to consider Appellants' appeal on its merits.

This Court, in *Logan v. Zimmerman*, articulated the fundamental Constitutional mandate that when a state adopts a particular judicial scheme, such as the right of appeal to an appellate court, that appellate court must treat all parties coming before it consistent with the due process and equal protection limitations of the U.S. Constitution. 455 U.S. at 428-433. In *Logan*, the Illinois Fair Employment Practices Act (FEPA), Ill Rev Stat, ch 48, Sect. 851 et seq (1979), gave the Commission created thereunder 120 days "within which to convene a fact finding conference" at the request of a

complaining party (Logan in this case). Through no fault of Logan, the Commission scheduled the "conference" five days after the expiration of the 120-day period stated in the FEPA. His employer then moved to dismiss his complaint on the ground that the provision in the FEPA that the hearing be held within 120 days was mandatory. The Supreme Court of Illinois upheld the employer's position and Logan appealed to tnis Court, contending his due process and equal protection rights had been violated. This Court stated the issue before it:

> At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due.

455 U.S. at 428.

This Court then observed that " a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause", citing ***Mullane v.***

Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and proceeded to state:

> This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In Societe Internationale v. Rogers, 357 US 197, 2 L Ed 1255, 78 S Ct 1087 (1958), for example - where a plaintiff's claim had been dismissed for failure to comply with a trial court's order - the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id., at 209, 2 L Ed 2d 1255, 78 S Ct 1087. See also Hammond Packing Co. v. Arkansas, 212 US 322, 349-351, 53 L Ed 530, 29 S Ct 370 (1909)(power to enter default judgment); Hovey v. Elliott, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897)(same); Windsor v. McVeigh, 93 US 274, 23 L Ed 914 (1876)(same). Cf. Wolff v. McDonnell, 418 US 539, 558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). *Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their*

> *claimed right[s].*" Boddie v Connecticut, 401 US 371, 380, 28 L Ed 2d 113, 91 S Ct 780 (1971).
> * * * * *
> "'While the legislature may elect not to confer a property interest, ... *it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.* . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.'" Vitek v Jones, 445 US, at 490-491, n 6, 63 L Ed 2d 552, 100 S Ct 1254, quoting Arnett v. Kennedy, 416 US, at 167, 40 L Ed 2d 15, 94 S ct 1633 (opinion concurring in part).

455 U.S. at 429-430, 432; emphasis ours. This Court then held that "[what]the Fourteenth Amendment does require, however, is an opportunity (to a hearing on the merits) ... granted in a meaningful manner." id. at 437. Four members of the Court (per Blackmun J.) concluded that the FEPA deadline provision also violated the Equal Protection Clause of the Fourteenth Amendment. 455 U.S. at 438-444.

In this case, the State of Texas has provided civil litigants with a mandatory right of appeal to an intermediate

appellate court, the state court of appeals. See Rules 40, 41, 50, 51, 54 of T.R.A.P. and App. R. There is nothing in the Texas rules that requires an appellant to file a Statement of Facts in order to perfect an appeal - in fact, it is clear that the decision *not* to file, or failure to file, a Statement of Facts is *not* jurisdictional. **Rule 54(a), T.R.A.P.; Weatherell v. Weatherell**, 403 S.W.2d 524 (Tex.App.- Houston 1966); ***McEntire v. McEntire***, 706 S.W.2d 347 (Tex.App. 1986); ***DeGarcia v. San Antonio & A.P. Ry. Co.***, 77 S.W. 275 (Tex.App., writ ref'd); ***Lane v. Miller & Vidor Lumber Co.***, 176 S.W. 100 (Tex.App.- San Antonio 1915, writ ref'd); ***Glass v. Kottwitz***, 297 S.W. 573 (Tex.App.- Galveston 1927, writ ref'd); 4 Tex.Jur. 3d, Sec. 349, at pp. 479, 480, and the cases there cited; and Rule 377, T.R.C.P.[13]

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13. Indeed, Rule 53, T.R.A.P., makes it clear that the "Statement of Facts" refers to the evidence elicited at the trial on the merits. Obviously, there was no trial on the merits in this case. Rule 53(a) states that Appellant will designate to the court reporter "the portion of the

While we can understand the rule that, where a case has been tried on the merits, the evidence relating to the merits of the case will be presumed against the appellant if the appellant does not file a Statement of Facts with the court of appeals, see *The Englander v. Kennedy*, 428 S.W.2d 806 (Tex. 1968), the extension of the *Englander* rule by the state court of appeals to the facts of this case

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evidence" such Appellant deems relevant for inclusion in the Statement of Facts (Appellants deemed no "evidence" relevant to this appeal because the Transcript contained all the documents necessary to a disposition of the appeal on the merits) and 53(b) and (d) gives the other parties, including the Appellees, the right to designate whatever they want in the Statement of Facts (it is significant that Appellees did not make *any* designations). Rule 53(d) provides, if a partial statement of facts is requested, "there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal". Rule 53(e) expressly warns appealing parties that "if either party requires more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal." In sum, it is clear in this case, that since there was no trial on the merits, there was absolutely no need for a Statement of Facts for the disposition of the merits of the appeal.

constituted a violation of the Appellants' Due Process and Equal Protection rights under the U.S. Constitution to have their appeal heard on its merits.

Indeed, if the Appellees were, for some remote reason, right in their contention that the Texas Rules relevant to a civil appeal can be construed to require the Appellants to file a Statement of Facts in order to have their appeal heard on its merits, then, for the reasons set forth in ***Logan*** and the cases cited therein, such rules are unconstitutional and violate Appellants' Due Process and Equal Protection rights. And even if the Texas Rules relevant to Appellants' appeal do not, on their face, violate the Due Process and/or the Equal Protection rights of the Appellants, the application of those rules and the rule in ***The Englander*** to this case, constitutes a deprivation of such Constitutional rights.

To be sure, the Texas Rules and Texas cases concerning civil appeals, establish

the following "rights" which the Appellants should, but were not, accorded the benefit of:

(1) Rule 74(f), T.R.A.P. made all material facts, necessary to decide the appeal in this case, undisputed.

Appellants stated the material procedural facts in their Briefs before the state court of appeals and the state Supreme Court (the same as stated in this Jurisdictional Statement) and the Appellees did not, in their Briefs before those courts, take issue with any of the material facts stated by the Appellants. See App. O and P. Therefore, the state appellate courts should have accepted the material facts as stated by the Appellants and thence decided the appeal on its merits.

As the Court in ***Whatley v. Whatley***, 493 S.W.2d 299 (Tex.App.-Dallas 1973) stated, in an opinion by Judge Guittard:

> Appellant suggests that we may review the trial court's ruling without a statement of facts, since we may

> accept as correct the statements in his brief which have not been challenged by appellee. He cites T.R.C.P. 419, (predecessor to Rule 74(b)) which provides: "Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by opposing party." Appellant correctly points out that appellee does not challenge the accuracy of any of the statements in appellant's brief but says only that the court has no record upon which it may overturn the decision of the trial court.
>
> In view of appellee's failure to challenge the accuracy of appellant's statement of the evidence, we shall proceed to consider the evidence as stated in appellant's brief under Rule 419. Although one purpose of this rule is to avoid casting on the appellate court the appellee's burden of searching the record to determine whether appellant's statement of the evidence is correct, it has also been applied to authorize the court to accept unchallenged statements in appellant's brief with respect to matters not included in the record.

493 S.W.2d at 301 and see authorities there cited.

Neither the court of appeals nor the Supreme Court of Texas in this case gave any reason whatsoever for not applying Rule 74(f).

(2) The appeal should have been resolved on its merits from the pleadings (motions for sanctions) because they (the motions), taken together with the rest of the Transcript, established that the Appellees' allegations did not support the sanction of dismissal with prejudice.

Another controlling rule in this case is that the state court of appeals must consider whether the pleadings (the motions for sanctions in this case) state sufficient facts to support the relief sought and/or support the judgment entered, even if there is no Statement of Facts before the Court of Appeals. *Weatherell v. Weatherell*, *supra*; *McEntire v. McEntire*, *supra*; *DeGarcia v. San Antonio & A. P. Ry. Co.*, *supra*; *Lane v. Miller & Victor Lumber Co.*, *supra*; *Glass v. Kottwitz*, *supra*; 4 Tex.Jur.3d, Sect. 349, at pp. 479, 480 and the cases there cited.

It is clear that the motions for sanctions in this case do not state facts or contain allegations sufficient to support the entry of a judgment of dismissal with prejudice. See TR 49-51 and 65-67 and App. I and K. They do not contain allegations of bad faith or contumacious conduct; or that any of the answers were unreasonably frivolous; or of prejudice to Appellees; or that Appellants had violated previously entered discovery orders; or that Petitioners had failed to attend hearings set by the court. Indeed, if anything, the motions for sanctions incorrectly state the facts because they indicate that *no* response to the interrogatories had been filed when, in fact, the Transcript indisputably establishes that responses had in fact been filed as to *all* the interrogatories and Appellees complained of only three (9,10 and 22) as being inadequate. See App. G, H and J.

Moreover, we note that Rule 215, 6 expressly directs that the proper way for the moving party to preserve anything relevant to the sanction proceedings, such as "affidavits", is to attach them to the motion for sanctions. Thus, Appellees' complaints about the absence of the Hillcrest affidavit from the record before the Texas appellate courts should have been directed to themselves - they should have supplemented their own motions by attaching the affidavit thereto, as provided for in Rule 215, 6. Had Appellees done so, the affidavit, for whatever it is worth - which is nothing in view of Appellees' statements in their briefs - would have been a part of the Transcript. Moreover, Appellees expressly admitted in their briefs filed in the Texas court of appeals, that such affidavit was consistent with their statements of the facts in their briefs, App. D, and a reading of such statements of facts establishes that they are *not* materially

different from the facts stated in this Jurisdictional Statement.

In the final analysis, the Texas court of appeals knew there was nothing in the affidavit of Hillcrest's counsel which in any way materially altered or conflicted with the undisputed procedural facts contained in the Transcript and such court knew that the ultimate sanction was not supported by the allegations in the pleadings (motions for sanctions). Therefore, such pleadings, all of which were contained in the Transcript which was before the appellate courts, *were sufficient*, on their face, to enable the court of appeals to adjudicate the appeal on its merits.

3) **Other situations in which the failure to have a Statement of Facts before the court of apeals is not fatal to consideration of the merits of the appeal.**

The general rule is that where no Statement of Facts is before the court of appeals, the case will be decided on the

basis of the Transcript; "the absence of a statement (of facts) does not affect the right to appeal". 4 Tex.Jur.3d at Sec. 336, p. 459. Of course, where a case has been tried on the merits, and the point of error in question requires an examination of the Statement of Facts in order for the appellate court to consider it, such as with respect to a claim of "insufficiency of the evidence", if there is no statement of facts before the appellate court it is only proper for the appellate court to presume that the evidence supported the judgment. *The Englander v. Kennedy.* But, even where the Statement of Facts is *not* before the appellate court, the record that is before the court, such as the Transcript, must still support the judgment. *Brown v. McLennan County Children's Protective Services,* 627 S.W.2d 390, 394 (Tex. 1982). And where, as here, there is a summary disposition, made on the basis of the matters contained in the

Transcript, the absence of a Statement of Facts creates no presumptions against the appellant, because there is no need to have before the court a Statement of Facts that contains nothing relevant to the merits of the appeal. *Foster v. Little Motor Kar Co.*, 290 S.W. 228 (Tex.App.-Dallas 1927); and see 4 Tex.Jur.3d, Sec. 349 at p. 479 and the cases there cited.

In sum, no quarrel can be made with the imposition of reasonable requirements upon parties attempting to perfect an appeal upon the merits of a civil case. But, when the state court of appeals and the state Supreme Court arbitrarily refuse to consider an appeal on a basis that "has no rational relationship to legitimate governmental objectives", see *Logan*, 455 U.S. at 444, then such appellants have been deprived of Due Process of Law and of the Equal Protection of the Laws under the U.S. Constitution. It would be ludicrous to say that the refusal by the Texas appellate courts to consider Appellants'

appeal on its merits in this case, on the ground that a Statement of Facts was not filed - where the Transcript (which was filed) indisputably contained all that was needed to enable the courts to decide the appeal on the merits - bears a "rational relationship to legitimate governmental objectives."

CONCLUSION AND PRAYER

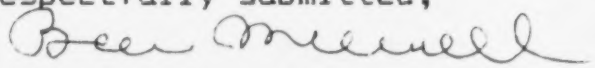
In this case, we have the sad spectacle of a minor plaintiff, too young to be of any assistance in the prosecution of her case, losing her property rights - her cause of action - simply because her father, who is confined to the state penitentiary, did not know the answer to two out of fifty-seven interrogatories. This totally blameless, faultless and innocent child, Shauna Marie Elliott, has had her constitutional right to petition the courts stripped away from her without the slightest semblance of due process of

law. The undersigned counsel begged the district judge at the very least *not* to dismiss Shauna Marie's case with prejudice. But he callously turned a deaf ear. It is clear that the most the district judge should have done is: (1) to decide whether the Appellants should be compelled to respond further to interrogatories 9 and 10, such as by ordering the Appellants, at their costs, to depose the in-laws in an effort to obtain the requested information from them (that is if they had such information; it must be remembered that the in-laws were uncooperative; they did not communicate with Gary Elliott; although compulsory process could be utilized for the taking of their depositions, there is no reason why the Appellees could not have taken such depositions on their own initiative); and (2) possibly impose attorneys fees upon counsel for Appellants since Appellees' counsel had filed motions for

sanctions during the period of Appellants' delay in filing the interrogatory answers.

The foregoing *is the most* that any reasonable, constitutionally sensitive, court conceivably could have been done, we submit, without trampling upon Appellants constitutional rights.

Respectfully submitted,



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